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December 21, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Docket Nos. 00-218

Dear Ms. Salas:

Enclosed for filing in the above captioned docket, please find an original and four copies of "Reply Motion to Strike of WorldCom, Inc.." Also enclosed are eight copies for the arbitrator. An extra copy is enclosed to be file-stamped and returned.

If you have any questions, please do not hesitate to call me at 202-639-6058. Thank you very much for your assistance with this matter.

Very truly yours,

Jodie L. Kelley

encl.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc., and for Expedited Arbitration	)	CC Docket No. 00-218

REPLY MOTION TO STRIKE
OF WORLDCOM, INC.

WorldCom, Inc. ("WorldCom") hereby submits its reply to Verizon Virginia Inc.'s Opposition to Motion to Strike of WorldCom, Inc. As explained in the WorldCom Motion to Strike and below, Verizon's inclusion of new contract language in the November JDPL deprived WorldCom of the opportunity to put any evidence onto the record in response to that language, and thereby violates the requirements of due process and the Administrative Procedure Act ("APA"). In its Opposition, Verizon does not dispute that the Commission's adoption of language to which WorldCom had no opportunity to respond would violate these legal requirements, but instead claims: that its proposed language is not "new," and that WorldCom therefore had a "full and fair opportunity to respond" to Verizon's position on the disputed issues, Verizon Opp. at 2-6; that the Act and FCC Orders preclude the grant of WorldCom's motion to strike the disputed contract language, id. at 6-8; and that WorldCom's "strategic decisions" can somehow be blamed for Verizon's failure to submit contract language at the appropriate

stage of the proceedings, id. at 8-12. Finally, Verizon attempts to make the inconsistencies in its DPL look less objectionable by including a list of the purported similar changes made by WorldCom and AT&T. See id. Exhs. A-1, A-2. As set forth in detail below, each of these arguments is specious. Indeed, Verizon's repeated efforts to minimize the significance of the JDPL highlight the fact that Verizon's submissions to the JDPL are completely unreliable, and cannot be presumed to reflect the positions taken by Verizon's witnesses or at earlier stages in the proceedings.[1] Verizon's consistently shifting position on the contract language appropriate for each issue has prevented WorldCom, and its witnesses, from being able to identify the language to which it should respond in testimony, and the newly proposed language must be stricken.

A. Verizon Did Not Present The Disputed Language To WorldCom In a Manner That Would Afford WorldCom A Full and Fair Opportunity to Respond.

In its Opposition, Verizon concedes that several of the provisions in the November DPL are new and contain language that had not previously been presented to WorldCom. See Verizon Opp. Exh. C. Verizon claims that the remaining disputed contract language is not new because it either appeared under another issue in a previous DPL, was included in the Verizon contract submitted May 31, 2002, or was updated to reflect the position taken by Verizon witnesses in their written or live testimony. See Verizon Opp. at 2-6. Even if Verizon's characterization of that subset of the disputed

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[1] WorldCom's JDPL submissions, in contrast, reflect the positions that WorldCom has consistently advocated, and should be accepted if the Commission resolves an issue in WorldCom's favor. As explained in Part D, supra, the few modifications that WorldCom made to the November JDPL were minor and should not be objectionable. However, WorldCom is willing to delete all of those modifications and return to the language submitted in the previous JDPL.

language were true, it would not alter the fact that Verizon's chosen means of presenting that contract language was so confusing and contradictory that it deprived WorldCom of an opportunity to review and respond to the Verizon proposals in its witnesses' testimony. As explained below and in the Motion to Strike, because Verizon failed to present its proposals in an appropriately clear and timely manner, the inclusion of the disputed language would violate WorldCom's due process rights and the requirements of the Administrative Procedure Act.

At the outset, although Verizon devotes the majority of its Opposition to arguing that the disputed language is not "new," it has admitted that several of the provisions in the November DPL did not appear in previous DPLs or in the contract that Verizon submitted with its Answer. See Verizon Opp. Exh. C. Verizon's efforts to explain why it included this language are irrelevant; no matter what Verizon's intentions were, the fact remains that this language is new, and WorldCom therefore did not have an adequate opportunity to respond to it. Thus there can be no serious dispute that the inclusion of these provisions in the interconnection agreement would violate WorldCom's due process rights and the APA. See WorldCom Motion to Strike at 5-8. As explained below, Verizon's attempts to defend the remaining disputed provisions are equally specious.

Verizon's suggestion that including its proposals in the proposed interconnection agreement submitted in May was sufficient to give WorldCom notice and an opportunity to respond to its proposed language is incorrect. As this Commission has recognized, simply presenting an interconnection agreement and asking a Commission "to comb through that agreement, identify the unresolved issues, and then adopt [the carrier's] positions on those issues" falls short of the clear and specific identification of issues

required by the Act. In re: Petition of MCI For Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, No. 97-166, 12 F.C.C.R. 15,594 ¶ 34 (Sept. 26, 1997). Verizon's decision to list several provisions in its initial interconnection agreement without explaining in its testimony how those provisions correspond to the disputed issues also falls short of the requirements of the Act and this Commission's procedural orders. Because the mere inclusion of the terms in the initially proposed interconnection agreement does not present Verizon's position with the requisite degree of clarity, it would be unreasonable to require WorldCom to sift through the Verizon proposed interconnection agreement and attempt to locate each provision that might be relevant to the disputed issues.

Verizon's assertion that it gave WorldCom adequate notice by including some of the disputed language under other issues in a previous DPL is similarly unpersuasive. The DPL was intended to summarize each party's position on each unresolved issue, and to include the proposed contract language relevant to those issues. See Procedures Established For Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and WorldCom, Public Notice, DA 01-279 at 7 (Feb. 1, 2001). Requiring WorldCom and its witnesses to parse through the DPL and determine whether the language might be relevant to other issues would be ridiculous. By submitting the DPL, Verizon indicated to WorldCom that the language in the DPL reflected its position on the issues to which that language was attached, and WorldCom had no reason to assume that the language might not be properly matched to the issues. Verizon now apparently believes that WorldCom should have looked at each DPL entry and then flipped through the hundreds of pages of contract language, as well as the Petition and Answer, to

determine whether any of the entries might also be related to another issue. Such a task would be logistically impossible and a waste of resources; indeed, it defeats the entire point of submitting a DPL. In addition, even if WorldCom could undertake such a daunting task, given that the carriers relied upon different witnesses for different issues, scattering the relevant language for one issue across several other issues in the voluminous DPL virtually guarantees that at least some of Verizon's proposed language would fail to attract the attention of the WorldCom witness qualified to respond to it.

Finally, the fact that some Verizon witnesses may have discussed the latest Verizon proposals at the hearings does not cure the procedural deficiency of the disputed portions of the November JDPL. As an initial matter, even if Verizon's witnesses purported to modify their positions, they did not offer new contract language during the hearings. Thus, there is no dispute that WorldCom was unable to submit evidence on the contract language Verizon now proposes. Nor was WorldCom able to submit its own evidence on any of the altered positions. At that stage of the proceedings, the witnesses' direct and rebuttal testimony had already been submitted, and the WorldCom lawyers had already prepared their cross-examination for the Verizon witnesses. See WorldCom Motion to Strike at 3, 7-8. The parties were only allowed to offer cross-examination and redirect examination, and therefore could not even explore the merits of the Verizon proposal with their own witnesses.[2] WorldCom's ability to respond to those proposals in the briefs would not cure the due process violation because WorldCom would have no

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[2] Even if there had been direct testimony at the hearings, however, limiting the WorldCom witnesses' response to the Verizon language to that context would unfairly deprive the witnesses of the opportunity to closely examine and reflect upon the Verizon language, or to discuss it with other WorldCom subject matter experts.

record evidence to support any critiques it might include in the brief, or to support factual assertions regarding, for example, the practical outcome of the Verizon proposal or its consistency with standard industry practice.

In sum, if Verizon desired to place its proposed contract language at issue it should have addressed that language in its witnesses' written testimony, and/or included the language in the appropriate section of earlier DPLs.[3] Had Verizon done so, the WorldCom witnesses could have responded to Verizon's position in their direct and/or rebuttal testimony, and WorldCom could have incorporated that testimony into its brief. Instead, Verizon chose to sandbag and propose new language after all testimony had been submitted. Because Verizon did not address its proposed language at the appropriate stage of the proceedings, WorldCom was unable to determine which provisions Verizon intended to include for certain issues, and the witnesses were thus deprived of a fair opportunity to respond to those proposals.

Verizon's submission of new language for Issue I-11 illustrates the unfairness of Verizon's actions. Although Verizon now claims that several of the disputed provisions regarding Issue I-11 were included in its proposed interconnection agreement, it never discussed any of those provisions in its witnesses' written testimony or during cross-examination at the hearings. WorldCom therefore has had no opportunity to address the merits of that language but instead could only respond to the more limited aspect of that

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[3] Indeed, in its Statement of Supplemental Issues Verizon criticized WorldCom for failing to discuss certain contract provisions in the initial Petition for Arbitration, and argued that those proposed sections should be excluded from the interconnection agreement.

issue that Verizon had previously identified.[4] See WorldCom Reply Br. at 163-64. This is not the result of WorldCom's "strategic decision" to rely only upon the DPL, see Verizon Opposition at 3-4, 13, but instead flows directly from Verizon's consistent failure to clearly identify the scope of its position and proposals regarding the disputed issues. For the reasons discussed in the WorldCom Motion To Strike, this violates both WorldCom's due process rights and the requirements of the APA. See WorldCom Motion to Strike at 5-8.

B. Neither The Act Nor This Commission's Orders Prevent The Commission From Granting WorldCom's Motion to Strike.

Verizon's assertion that the Act and this Commission's orders preclude the granting of WorldCom's Motion to Strike rests on a mischaracterization of WorldCom's position and a misreading of the Act and this Commission's orders. First, Verizon asserts that the end result of arbitration is an order resolving open issues, as opposed to an interconnection agreement. See Verizon Opp. at 6-7. Verizon then contends that WorldCom wants the Commission to "ignore all but the JDPL," and responds to that perceived WorldCom position by claiming that the Commission's review of disputed issues under the Act extends to the substantive positions that Verizon has presented in its pleadings and testimony, and is not limited to the Verizon JDPL. Id. at 7-8. Both of these claims are specious.

Verizon's assertion that the arbitration should yield an order resolving open issues without adopting an interconnection agreement cannot be squared with the Act or this

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[4] Although WorldCom has made an effort to respond to those proposals in its reply brief, as explained above, WorldCom could not rely upon any testimony to support its assertions.

Commission's orders. The Act does not merely contemplate that the Commission will review "issues," but instead provides that it will do so "by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement." 47 U.S.C. §252(b)(4). Consistent with this requirement, the Commission asked that the parties submit proposed contracts, requested the filing of a JDPL to link the contract language to the disputed issues, and asked questions of the witnesses regarding the parties' proposed language. Accordingly, the Commission plainly contemplated that this proceeding would end with the approval of an interconnection agreement. For Verizon to now assert otherwise is absurd.[5]

Verizon next claims that WorldCom would like to give "preclusive effect" to its proposed DPL, and attempts to refute this purported WorldCom position by asserting that the JDPL should instead be a "demonstrative tool." Verizon has it backwards. WorldCom has asked that the Commission ignore the portions of the Verizon JDPL that have no basis in the Verizon testimony, and has consistently asserted that Verizon's JDPL is unreliable because it does not track the evidence that is properly on the record. See, e.g., WorldCom Reply Br. at 2-3, 42. That is, WorldCom feared that the Commission might rely on the accuracy of the Verizon JDPL and, when resolving an issue in Verizon's favor, adopt the new JDPL language despite the lack of any support for that language in the Verizon testimony, and despite WorldCom's witnesses' ensuing inability to submit evidence evaluating and/or criticizing the Verizon proposal. Thus to the extent that Verizon now believes that the latest JDPL should not trump the testimony

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[5] Cox Communications has filed a separate response addressing this issue, and WorldCom agrees with and hereby adopts the arguments presented in that filing.

on the record, and that the Commission need not rely on the Verizon JDPL submissions when resolving the disputed issues, WorldCom could not agree more.

C. Verizon's Attempt To Blame WorldCom For The Discrepancies Between Its Latest JDPL and Its Previous Submissions Is Specious.

Remarkably, Verizon devotes four pages of its Opposition to a discussion that does nothing more than rehash the arguments that Verizon has raised, and lost, in earlier stages of the arbitration proceedings. First, Verizon contends that the "threshold 'battle of forms' question has continued to haunt the filings throughout this proceeding," and that the arbitrations are therefore being conducted from a "flawed starting point." Verizon Opp. at 9. Verizon then asserts that the parties' negotiations were not sufficiently complete at the time that WorldCom filed its preemption petition, and that the arbitration is therefore premature. Id. at 9-10. Verizon also cites to its objections in its Answer, and in its July 9, 2001 correspondence, in which it claimed that WorldCom failed to properly identify and articulate the issues in dispute. See id. at 10-11. Verizon concludes by asserting that the WorldCom filings to which Verizon objected "forced Verizon VA to play catch-up and keep up" in these proceedings, and somehow made it difficult for Verizon to link its proposed contract language with the issues that WorldCom identified in its petition. Id. at 12. Yet Verizon deliberately ignores the fact that the Commission has already rejected the arguments that Verizon raised in those filings, and that WorldCom's Petition, testimony, and proposed agreement are therefore fully consistent with this Commission's procedural determinations. Moreover, WorldCom's identification and inclusion of the relevant contract language in its pleadings and the witnesses' written testimony made WorldCom's position on the disputed issues perfectly clear. Verizon thus had every opportunity to present its

response and counterproposals to the WorldCom proposals, and should not be allowed to invoke WorldCom's compliance with this Commission's directives as an excuse for failing to do so.

D. The Few Modifications To the WorldCom DPL That Verizon Identified Do Not Warrant Denial Of the Motion To Strike.

Verizon attempts to downplay its own misconduct by suggesting that both WorldCom and AT&T made comparable changes to the November JDPL. See Verizon Opp. at 3, Exh. A-2. Even a cursory review of Verizon Exhibit A-2 demonstrates that the WorldCom modifications cannot seriously be compared to the Verizon modifications. First, WorldCom only altered the language for three issues, as opposed to the thirty-plus issues for which Verizon submitted new language. More significantly, those few changes were made to satisfy concerns expressed by Verizon, and WorldCom has no objection to striking those changes from its November JDPL and reinstating the initially proposed language. Specifically, the changes to the language proposed regarding Issues I-6 and IV-35 merely clarified that WorldCom's proposed contract language on these issues was not meant to conflict with the ISP Remand Order, and to conform that language to the proposal that WorldCom described in the letter that recast the WorldCom reciprocal compensation proposal to adhere to that Order. The changes to Issue IV-37 consist of the addition of language proposed by Verizon during mediations and negotiation, and a handful of minor non-substantive edits. If Verizon now wants WorldCom to remove that language from its proposal, WorldCom will gladly do so.

CONCLUSION

Verizon has failed to present any persuasive grounds for denying WorldCom's Motion to Strike the portions of the November JDPL that reflect new Verizon proposals. Although Verizon claims that its language is not "new," the November JDPL was the first time that it presented these proposals to WorldCom in a manner that clearly linked the contract language to the disputed issues. Verizon could, and should, have made its proposals clear in its testimony, and its failure to do so deprived WorldCom of an opportunity to respond to the Verizon position. Therefore, the inclusion of the disputed contract language would be patently unfair, and would violate WorldCom's due process rights and the requirements of the APA. For the reasons discussed above and in the WorldCom Motion to Strike, the disputed Verizon language must be stricken.

Respectfully submitted

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CERTIFICATE OF SERVICE

I do hereby certify that true and accurate copies of the foregoing "Reply Motion to Strike of WorldCom, Inc." were delivered this 21st day of December, 2001 via Federal Express and regular mail to:

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